SUPREME COURT, U. S.

FILED

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NO. 955

IN THE

Supreme Court of the United States

October Term, 1966

YOUNG & COMPANY OF HOUSTON, *Petitioner*

-VERSUS-

ROBERT S. CALVERT, AS COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals,
Third Supreme Judicial District of Texas, at Austin

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
1. The State Court has decided a federal question of substance not heretofore precisely determined by this Court, in a way probably in conflict with applicable decisions of this Court: The United States Constitution forbids direct taxation of foreign commerce by the States, and stevedoring operations are an integral part of foreign commerce. The parties have here stipulated that the instrumentalities here on account of the use of which the tax is imposed are essential to the performance of the stevedoring operations and hence are themselves an integral part of foreign commerce. The Use tax is here a direct imposition upon these instrumentalities and therefore unconstitutional in its application to stevedoring operations	7
Conclusion	10
Appendix A (Opinion of Court of Civil Appeals)	11
Appendix B (Order of Texas Supreme Court)	16

INDEX OF AUTHORITIES

CASES	Page
A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485 (1923)	10
Crew Levick Co. v. Commonwealth, 245 U.S. 292, 38 S.Ct. 126 (1917)	10

CASES	Page
Empresa Siderurgica v. County of Merced, 337 U.S. 154, 156, 69 S.Ct. 995, 997 (1949)	9
Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815 (1947)	8
Puget Sound Stevedoring Co. v. Tax Commission of the State of Washington, 302 U.S. 90, 58 S.Ct. 72 (1937)	8
Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 83, 67 S.Ct. 156, 164	8
CONSTITUTION OF THE UNITED STATES	
Article I, Section 8, Clause 3	3
Article I, Section 10, Clause 2	3
STATUTES	
28 U.S.C. § 1257(3)	2
R.C.S. Texas, Articles 1728 and 1729	7
Vernon's Annotated Revised Civil Statutes of the State of Texas, Volume 20A, Taxation-General, Chapter 20:	
Article 20.01	3
Article 20.02	4
Article 20.021(A)	4
Article 20.03(A)	4
TEXAS RULES OF CIVIL PROCEDURE	
Rules 468 and 469 (c)	7
Rule 483	7

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PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals,
Third Supreme Judicial District of Texas, at Austin

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Young & Company of Houston respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Third Supreme

Judicial District of Texas, at Austin, entered in the above cause on June 22, 1966.

OPINIONS BELOW

The Opinion of the Court of Civil Appeals (Phillips, Associate Justice) is reported at 405 S.W.2d 174. It is printed in the Appendix.

The petitioner's Application for Writ of Error was REFUSED by the Supreme Court of Texas on October 12, 1966, without opinion.

JURISDICTION

The original judgment of the Court of Civil Appeals was entered on June 22, 1966. Motion for rehearing was denied on July 13, 1966.

Petitioner's Application for Writ of Error to the Supreme Court of Texas was by that Court REFUSED on October 12, 1966, by order of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

A company is engaged exclusively in the business of a contracting stevedore for ocean-going vessels transporting goods in foreign commerce, i.e., the company's employees load and unload the cargoes which the ocean-going vessels transport by sea between the United States and foreign countries. To carry on its business the company must furnish to its manual-labor employees machines and equipment. The company leases such machines and equipment so used in its stevedoring business, and the Texas taxing

authority requires the company to pay the Texas Use tax on the sums paid for the rental or lease of these machines and equipment.

Is such State use tax a tax on foreign commerce the power to levy which is reserved to the Congress by the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3)?

Is such State use tax an "Impost" or "Duty" on Imports or Exports the levy of which is forbidden to the State by the Export-Import Clause of the United States Constitution (Article 5, Section 10, Clause 2), when levied as here without the consent of the Congress?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article I, Section 8, Clause 3:

> "The Congress shall have power . . . to regulate Commerce with foreign Nations, . . ."

Article I, Section 10, Clause 2:

> "No State shall, without the consent of the Congress, levy any Imposts or Duties on Imports or Exports . . ."

Statutes of the State of Texas

(Vernon's Annotated Revised Civil Statutes of the State of Texas, Volume 20A, Taxation-General)

Chapter 20—"*Limited Sales, Excise and Use Tax*"

"Art. 20.01—*Title—Definitions*

"This Chapter is known and may be cited as the 'Limited Sales, Excise and Use Tax Act,' and the fol-

lowing words shall have the following meanings unless a different meaning clearly appears from the context:

. . . .

"Art. 20.02—*Imposition of Limited Sales Tax*"

. . .

"Art. 20.021—*Method of Collection; Bracket System*

"(A) Every retailer shall add the sales tax imposed by Article 20.02 of this Chapter to his sale price and when added the tax shall constitute a part of the price, . . .

"Art. 20.03—*Imposition and Rate of Use Tax*

"An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased, leased or rented . . . for storage, use or other consumption . . .

(A) *Liability for Use tax:* Extinguishment of Liability. Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer or leased or rented from another person for such purpose is liable for the tax. His liability is not extinguished until the tax has been paid to this State . . ."

STATEMENT OF THE CASE

Petitioner at all pertinent times is and was a domestic corporation engaged exclusively in the business of loading and unloading ocean-going vessels, that is to say the company acts as the stevedore of vessels which carry cargoes by sea between the United States and foreign countries. It made contracts with the owners and operators of such vessels to load and unload these vessels in the Port of Houston, Harris County, Texas. Bedell dep., pp. 4-7, 22. The actual loading and unloading was done by manual laborers (long-

shoremen) employed by the company, and to perform their work the longshoremen used machines and equipment. The use of such machines was essential to the performance of the stevedoring operations. Bedell dep., pp. 11-13.

All of these machines and equipment so used were leased, and the lease rentals cost was figured into the rates charged the operators and owners of the ships. Bedell dep., pp. 12, 21.

Petitioner did not pay to its lessors the percentage of such lease rental amounts required to be paid to comply with the provisions of the Texas Limited Sales, Excise and Use Tax, in the belief that no tax was owing because petitioner was engaged in foreign commerce and the tax in its case would be a state tax on foreign commerce. The respondent Comptroller of the State of Texas disagreed, and he made a tax deficiency assessment accordingly. The tax so determined by the respondent was paid by petitioner under protest, and after the respondent refused refund suit was filed in accordance with law to recover these amounts as unlawfully assessed and collected. Tr., 3-6.

The deposition of the witness Bedell was taken, and the parties entered into the following stipulation:

> "The machines and pallets, the lease rentals of which are here taxed, were leased to plaintiff to be used exclusively in the loading and unloading of the cargoes transported aboard ocean-going vessels engaged exclusively in foreign commerce, and were so used, and such cargoes could not reasonably in accordance with present usages and practices of transporting such cargoes have been transported in foreign commerce without the use of such machines." Tr. 20.

Respondent then moved for summary judgment. Each party submitted briefs, petitioner's contending the tax unconstitutional as applied to its operations. Without opinion the trial court granted respondent's motion and entered judgment for respondent. Tr., 28-30.

This judgment was affirmed by the Court of Civil Appeals. Its complete opinion is printed in the Appendix.

Petitioner's contention that the tax had been imposed upon it contrary to the immunity from such taxation granted by the United States Constitution was plainly put to the Court of Civil Appeals, which rejected such contentions. That the issue before that Court was the unconstitutionality of the tax in its application to petitioner is shown by the following excerpt from the opinion of the Court of Civil Appeals:

> "Appellant is before this Court on a single point of error, being that of the trial court in holding the tax lawful on the machines and equipment the lease cost of which is here taxed were used by the stevedore as a necessary adjunct to carrying on its business, a business which is an integral part of foreign commerce. The sales and use tax here imposed is therefore an impost upon foreign commerce and its imposition is unlawful because (a) an exercise by a State of a power granted exclusively to the Congress of the United States by the Commerce Clause of the Constitution of the United States and (b) an impost or duty on imports and exports also forbidden to the States by the Constitution. Since the Texas Statute recognizes and exempts from taxation subjects which are prohibited to it by the Constitution of the United States, the tax is unlawful under the Texas Statute also.
>
> "We overrule this point."
>
> . . .

In accordance with the Texas statutes and Rules of Civil Procedure appeal was taken to the Supreme Court of Texas by timely filing of a motion for rehearing and after denial of such motion by the Court of Civil Appeals by timely filing of an Application for Writ of Error with the Supreme Court. R.C.S. Texas Articles 1728, 1729; Texas Rules of Civil Procedure, Rules 468, 469(c).

The Supreme Court Refused this Application, and the judgment of the Court of Appeals thus became final. Texas Rules of Civil Procedure, Rule 483.

REASONS FOR GRANTING THE WRIT

The State Court has decided a federal question of substance not heretofore precisely determined by this Court, in a way probably in conflict with applicable decisions of this Court: The United States Constitution forbids direct taxation of foreign commerce by the States, and stevedoring operations are an integral part of foreign commerce. The parties have here stipulated that the instrumentalities here on account of the use of which the tax is imposed are essential to the performance of the stevedoring operations and hence are themselves an integral part of foreign commerce.

The Use tax is here a direct imposition upon these instrumentalities and therefore unconstitutional in its application to stevedoring operations.

That stevedoring operations, the loading and unloading of ships transporting by sea cargoes between the United States and foreign countries, are part and parcel of foreign commerce has been settled by decisions of this Court.

Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815 (1947), and *Puget Sound Stevedoring Co. v. Tax Commission of the State of Washington*, 302 U.S. 90, 58 S.Ct. 72 (1937).

In the Puget Sound Stevedoring Co. case a tax levied upon the gross receipts of a stevedoring concern was stricken down, as a direct tax on an integral part of foreign commerce. In the instant case there is uncontested evidence that the use tax here would be a direct cost of the petitioner's stevedoring operations, and hence it is a direct tax on the foreign commerce, certainly as direct as and possibly even more direct than was the gross receipts tax in the Puget Sound Stevedoring Co. case.

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156 (1946), it is held that a direct tax on exports cannot be excused upon the plea it is a tax on the "preliminaries" of the exportation, where the State contended its sales tax was not on the goods but was on a "transaction" prior to exportation of the goods which were to be shipped abroad. After holding that while the States had some limited power to tax under the Interstate and Foreign Commerce Clause of the Constitution, the application of the sales tax imposed prior to export was rejected, on the ground that by virtue of the Import-Export Clause the States had no power at all to tax imports and exports and the tax was in reality one on exports: It was then made clear that *taxes imposed on instrumentalities necessary to the carrying on of foreign commerce were as unlawful as if imposed on the goods themselves*, it being said,

> ". . . Thus a federal stamp tax on a foreign bill of lading is a tax on exports, since, it is equivalent of a

direct tax on the articles included in the bill of lading. Fairbank v. United States, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862. The same is true of federal stamp taxes on charter parties made excusively for the carriage of cargo in foreign commerce, United States v. Hvoslef, 237 U.S. 1, 17, 35 S.Ct. 459, 464, 59 L.Ed. 813, Ann. Cas. 1916A, 286, for a tax on those charter parties is 'in substance a tax on the exportation; and a tax on the exportation is a tax on the exports.' The same is likewise true of federal stamp taxes on policies insuring exports against maritime risks. Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821, Ann. Cas. 1915D, 1087. The Court stated, 237 U.S. at page 27, 35 S.Ct. at page 499, 59 L.Ed. 821, Ann. Cas. 1915D, 1087:

" 'The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process.' " (329 U.S. 80, 67 S.Ct. 162)

While on the facts it was decided that the goods had not yet entered the stream of foreign commerce and were still part of the mass of property within the state and hence subject to the property tax, in *Empresa Siderurgica v. County of Merced*, 337 U.S. 154, 156, 69 S.Ct. 995, 997 (1949), it is held:

". . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . ."

Like holdings are made in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 43 S.Ct. 485 (1923), and *Crew Levick Co. v. Commonwealth*, 245 U.S. 292, 38 S.Ct. 126 (1917).

Petitioner respectfully submits that the Texas statute in clear and unambiguous language taxes the *use* of the article, and since the articles here are clearly by the stipulation of the parties used in the stream of foreign commerce the tax is a direct one imposed upon foreign commerce and therefore unconstitutional.

CONCLUSION

A Writ of Certiorari should be granted to review the decision of the Court of Civil Appeals herein.

Respectfully submitted,

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APPENDIX A

IN THE

Court of Civil Appeals

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 11,418

YOUNG & COMPANY OF HOUSTON, *Appellant*

vs.

ROBERT S. CALVERT ET AL, *Appellees*

From The District Court of Travis County, 147th Judicial District, No. 133,230, Honorable Mace B. Thurman, Jr., Judge

This is an appeal from a judgment of the District Court holding that taxes imposed by the Texas Limited Sales, Excise, and Use Tax Statue, Article 20.01, et seq., of Title 122A, Taxation-General, V.C.S., are lawfully collectible on the amounts paid by a contracting stevedore to lease machines and equipment used in loading and unloading deep sea vessels engaged in foreign commerce.

We affirm this judgment.

Appellant Young & Company of Houston are contracting stevedores who, under contracts with owners and operators of ocean-going cargo vessels, load and unload such vessels at the Port of Houston, Harris County, Texas. Manual laborers (longshoremen) physically handle these cargoes on and off the vessels. Appellant furnishes these men tools for loading and unloading such as fork-lift trucks to handle palletized cargoes, grain trimming machines to

trim and stow grain cargoes, heavy-lift machines for cargoes weighing several tons and squeeze machines to handle bales of cotton.

All of these machines and equipment used by appellant in carrying on its business are leased and the lease cost is figured into and is a part of the cost of doing business.

The appellee Comptroller determined that the abovementioned tax was due upon the lease rental paid by appellant to the lessors of the machines and equipment and made a deficiency tax assessment accordingly. The tax plus accrued interest was paid under protest and suit was filed pursuant to statute to recover such amounts as unlawfully assessed and collected after refund was refused.

Appellant is before this Court on a single point of error, being that of the trial court in holding the tax lawful on the machines and equipment the lease cost of which is here taxed were used by the stevedore as a necessary adjunct to carrying on its business, a business which is an integral part of foreign commerce. The sales and use tax here imposed is therefore an impost upon foreign commerce and its imposition is unlawful because (a) an exercise by a State of a power granted exclusively to the Congress of the United States by the Commerce Clause of the Constitution of the United States and (b) an impost or duty on imports and exports also forbidden to the States by the Constitution. Since the Texas Statute recognizes and exempts from taxation subjects which are prohibited to it by the Constitution of the United States, the tax is unlawful under the Texas Statute also.

We overrule this point.

Art. 20.02 imposes "a limited sales tax at the rate of two per cent (2%) on the receipts from the sales at retail of all tangible personal property within this State."

Article 20.01(d) defines "receipts" as meaning "the total amount of the sale or lease or rental prices . . . of the rental sales of retailers. . ."

Article 20.04(a) exempts "the receipts from the sale, lease, or rental of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale, lease or rental of, which, or the storage, use or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Consitution of this State."

51 American Jurisprudence, Taxation, Sec. 206 states the following:

> "The fact that property is used or employed in interstate or foreign commerce does not of itself render it immune or exempt from nondiscriminatory local taxation. This rule includes intangible as well as tangible property. . . . It is held, accordingly, that a state may levy taxes on property used in interstate or foreign commerce, located therein, by whatever name they may be called, that are fixed by reference to the value of the property, if they are not imposed because of such use, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed."

While generally a State is prohibited from imposing a tax upon the business or privilege of engaging in interstate or foreign commerce, a State excise tax which affects such commerce only incidentally or indirectly may be entirely valid "where it is clear that it is not imposed with the covert purpose or with the effect of defeating rights under the commerce clause. Thus, the fact that a state tax in-

creases the cost of doing business . . . does not necessarily render it an unconstitutional burden on such commerce." 51 Am.Jur. 268-270, Taxation, Sec. 207.

The tax here is not imposed upon appellant's stevedoring operation or its receipts therefrom, but the tax is imposed upon an independent transaction preparatory to such operation. This case is controlled by that line of decisions such as McGoldrick v. Berwind-White Coal Mining Company, United States Supreme Court, 309 U.S. 33 (1940) and, more recently, Canton Company of Baltimore v. Comptroller of Treasury, Supreme Court of Maryland, 231 Md. 294, 190 A.2d 92.

In McGoldrick the Court upheld the New York Sales Tax levied on coal shipped into New York from Pennsylvania and construed the tax as being imposed on a local transaction which the State had a right to tax and not as an undue burden on interstate commerce as such. The Court held that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of the State tax burdens merely because the incidental or consequential effect of the tax is the increase of the cost of doing the business. That the tax imposed was for State purposes and that the State was not exercising any power which the Constitution has conferred upon the Congress. That it is only when the tax operates to regulate commerce between the States or with foreign nations to an extent which infringes the authority conferred upon Congress that the tax can be said to exceed the constitutional limitations. The Court further held that the tax was equal and that it did not aim at or discriminate against interstate commerce. That it was laid upon every purchaser within the State, of goods of consumption, regardless of whether they have been transported in interstate commerce.

In Canton Company of Baltimore, the Court upheld a State sales tax on the amount paid for leasing, loading and unloading equipment of a stevedoring company whose business was 98 per cent foreign commerce and 2 percent interstate. The facts are similar to the case at bar. Here the Court held that the tax was not imposed directly upon the stevedoring operation. The Court held that the tax was on the continued right to possession of the leased property and was not a tax on the use of the property even though the amount of the tax was measured by the amount of the tonnage handled.

The tax in question here is a transaction tax and not a use tax. See Calvert v. Canteen Co., 371 S.W.2d 556, Supreme Court.

Appellant has cited cases such as Puget Sound Stevedoring Company v. Tax Commission of the State of Washington, 302 U.S. 90, 58 S.Ct. 72 (1937), and Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422, 67 Sup.Ct. 815 (1947), in addition to others, which, in our opinion, are not applicable here. Both of these cases involved a general gross receipts tax on the privilege of doing the business of stevedoring.

Appellant is a domestic corporation doing business in Texas. Since it receives the same benefits as any other domestic corporation it must shoulder its share of the tax burdens. The tax in question is applicable to all lessees in Texas leasing equipment such as that used by appellant. The fact that appellant's equipment is used in the furtherance of foreign commerce is not controlling here. The tax is imposed on a local transaction and is levied in a field remaining to the States for purposes of revenue.

The judgment of the trial court is affirmed.

John C. Phillips, Associate Justice

Affirmed
Filed: June 22, 1966.

APPENDIX B

ORDERS OF THE SUPPREME COURT OF TEXAS PRONOUNCED OCTOBER 12, 1966

Orders on Applications

The following Application for Writ of Error is REFUSED:

A-11628: Young & Company of Houston v. Robert S. Calvert, as Comptroller of Public Accounts of the State of Texas; from Travis County.